IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,

Appellants,

vs.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY BROWNING STEWART, Also Known As DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person,

Appellees.

PETITION FOR REHEARING

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The appellees respectfully submit that they have been aggrieved by the judgment or decision of this Court rendered on June 23, 1958, and petition for a rehearing of said matter.

The grounds of this petition are as follows:

1. This Court completely disregards the fact that the decision of the Circuit Court of Florida held that the trustees are not indispensable parties (R. 110, 112, 120). Since that determination was left undisturbed by the Supreme Court of Florida, (R. 192) which held it was not necessary to review that holding,—ergo, it is the Law of this Case.

This Court ought not to dictate the internal law of the sovereign State of Florida when that determination in this case has already been made oppositely by a Florida court with jurisdiction to do so.

2. **This Court also ignored the fact that the Wilmington Trust Company, the trustee of the indenture in question, concededly had parted with all legal title to the trust assets by payment out prior to the commencement of the litigation (R. 61-62, 105-106) and therefore was not a real or necessary party in interest. In addition, the Delaware Trust Company as appointee under the exercise of the power, already was before the Florida Court** as a trustee-legatee under the residuary provisions of the Will, and as a beneficiary-legatee under the testamentary direction for payment by the executrix of the estate taxes upon the property so appointed to the Delaware Trust Company.

This Court also has overlooked the fact that the residuary legatees will *not* receive the sum of $500,000. each, as expressed in the majority opinion of this Court, but will actually receive, in trust, a sum substantially depleted by the direction for the payment of those estate taxes out of the testamentary estate upon the $1,400,000. disposed of by the inter vivos appointment.

3. **This Court has deliberately violated and destroyed the right of Florida to deal with its domiciliaries and legatees properly before the Court below and unquestionably subject to its jurisdiction.** The executrix was before the Florida Court as a Florida domiciliary and appointee in a true adversary proceeding attempting to protect certain personal interests of her own and of her minor children adverse to her paramount fiduciary responsibility as executrix. These appellees have not received from this Court or from their fiduciary, the Florida executrix, the impartial protection of the law due them. This Court disregards the fact that it was and is correct and lawful for the Florida Court to hold this executrix and the other parties personally served to a binding judgment and to call the parties before it to account for their actions.

4. Neither this Court nor the Delaware Court has any right to interfere with the Florida determination of the invalidity of the exercise of a power of appointment or of any other paper writing necessarily involved in probate proceedings in so far as the Florida Court has determined what its own law is with respect thereto and affecting only its own citizens.

The effect of this Court's decision is to do more than deny Florida the right to bind the Delaware trustees. For example, it has deprived Florida of the right to direct that its own executrix shall not pay the substantial inheritance taxes provided to be paid under paragraph "Fifth" of the Will, (R. 13) upon the $400,000. which is payable to others through the purported exercise of the power of appointment under the trust agreement.

In expressly appointing the balance of the inter vivos trust property to her estate, (R. 34) the testatrix merged that property with her testamentary estate for the purposes of distribution under her Will. We assume that the Court will agree this far, that if the testatrix had held title to the securities in her own name in Delaware, they would have been just as much a part of her estate and subject to her Will the same as the other property owned by her and physically located in Florida.

This Court, therefore, ought not to invade the sovereign precincts of Florida and deny to it the right to say that no inheritance taxes or other payments shall be made out of the Florida estate. This Court has acted to the detriment of the Florida legatees and for the benefit of Delaware trustees.

In *Riggs* v. *del Drago*, 317 U.S. 95, 97-98, 87 L. ed. 106, 110-111, this Court stated: "We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; . . ."

This Court repeatedly has held that the power to regulate transmission of property by will is exclusively for the states. *United States* v. *Fox*, 94 U.S. 315, 24 L. ed. 192; *United States* v. *Perkins*, 163 U.S. 625, 41 L. ed. 287; *Irving Trust Co.* v. *Day*, 314 U.S. 556, 86 L. ed. 452.

3. It is the testatrix herself, as grantor of the trust, who made the trustees such in name only. That they were actually reduced by her to mere administrative and disbursing agents has been covered before and need not be repeated herein. Equally important, we believe, is the manner in which she interwove and blended the dispositions through her testamentary and inter vivos instruments.

Paragraph "Fifth" of the Will expressly makes the Delaware trust indenture a matter of substantial Florida concern in that said indenture is incorporated therein by reference through the following:

(a) The express direction for payment of inheritance taxes on the Delaware property out of the Florida estate gives the inter vivos trustees a direct contact with the Will for it makes them beneficiary-legatees of that direction for tax payment on property in their hands.

(b) The express inclusion in the Florida residuary estate of all property over which the testatrix might have a power of appointment which was not effectively exercised by her, imposes upon the Florida executrix the burden and duty of collecting assets not otherwise effectively disposed of and subjects the Delaware property and manner of its appointment to the scrutiny and test of the Florida courts.

(c) The Will purports to dispose of the property appointed to the executrix, as such, according to the express exercise of the power of appointment under the trust indenture by the first power instrument dated December 3, 1949, par. 2(b). (R. 34) The exercise of the power must be read *with*, not separate from, the Will in order to determine its validity. 1 Scott on Trusts, 2 ed., pp. 373-377. To fail

to relate those instruments to each other would carry the matter, as the late Judge Cardozo observed in *Matter of Rausch;* 258 N.Y. 327, 179 N.E. 755, to "a drily logical extreme."

As was held in the recent case of *Matter of Deane* 4 N.Y. (2nd) 326 at p. 331 it is the general rule in this country that the law of the domicile of the donor of the power controls the disposition upon the theory that she is the owner of the property.

The complete power reserved by the testatrix to dispose of the fund as she saw fit not only gave her a "beneficial interest," (cf. *Whitney* v. *State Tax Commission,* 309 U.S. 530, 538, 84 L. ed. 909, 913; Op., Frankfurter, J.) but was equivalent to an absolute ownership by her of the fund. *Helvering* v. *Clifford,* 309 U.S. 331, 84 L. ed. 788; Op., Douglas, J.; *Manion* v. *Peoples Bank of Johnstown,* 292 N.Y. 317, 55 N.E. 2d 46. In essence, the settlor was the sole beneficiary. *Weymouth* v. *Delaware Trust Co.,* 29 Del. Ch. 1, 45 A.(2d) 427; *Adams* v. *Adams,* 147 Fla. 267, 2 So. (2d) 855.

This Court did violence to the rigidly entrenched paramount right of the State to determine how and in what manner the wills of its domiciliaries shall operate upon property to which they are related. *Frederickson* v. *The State of Louisiana,* 64 U.S. 445, 23 How. 445, 16 L. ed. 577.

In all justice to the appellees whose rights are destroyed the least this Court ought to do is to define how far it intends its decision to go in dictating the *internal administration* of the Florida estate! How far does this Court's usurpation of *declaring Florida State law* go?

6. *This Court lost complete jurisdiction to reverse the Florida judgment upon granting the motion to dismiss the Florida appeal for lack of jurisdiction.* Its only lawful course was to retain jurisdiction of the appeal and treat it as a petition for a writ of certiorari.

Title 28 U.S.C.A. Sec. 2103, expressly provides that if the appeal to this Court is improvidently taken, "*. . . this alone shall not be ground for dismissal;*" but the papers on appeal shall be regarded as a petition for a writ of certiorari. It is thus clear, as stated, that this Court should not have dismissed the Florida appeal, and having done so it lost jurisdiction herein and did not have the statutory power to treat the papers as a petition for a writ. Accordingly, its order reversing the Florida judgment is void and should be vacated.

WHEREFORE, and for other reasons appearing in appellees' briefs previously filed on the appeal, they respectfully petition that a rehearing be granted and that issuance of the mandate of this Court be stayed pending disposition of this petition.

Respectfully submitted,

SOL A. ROSENBLATT
Counsel for Petitioners (Appellees)

July 1, 1958

Certificate of Counsel

I, SOL A. ROSENBLATT, of 630 Fifth Avenue, New York, New York, an attorney duly admitted to practice in this Court, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated, July 1, 1958.

SOL A. ROSENBLATT
Counsel for Petitioners (Appellees)